(3) (3)

NO. 87-2067/88-246

In the Supreme Court of the United States

OCTOBER TERM, 1988

JO B. BANKSTON, ET AL,
Petitioners
in No. 87-2067

ROBERT A. BACHE, JR., ET AL,
Petitioners
in No. 88-246

v.

AMERICAN TELEPHONE & TELEGRAPH CO., AT&T INFORMATION SYSTEMS, INC., SOUTH CENTRAL BELL TELEPHONE COMPANY, AT&T COMMUNICATIONS, INC. AND THE COMMUNICATIONS WORKERS OF AMERICA,
Defendants

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION OF RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH CO., AT&T INFORMATION SYSTEMS, INC. AND AT&T COMMUNICATIONS, INC. TO PETITIONS FOR WRITS OF CERTIORARI

OF COUNSEL

JOE RAMIREZ
LAWRENCE M. JOSEPH
American Telephone & Telegraph Co.
One Oak Way
Berkeley Heights, N.J. 07922
Telephone: (201) 771-2174

ROBERT K. McCALLA,
Counsel of Record
KEITH M. PYBURN, JR.
McCalla, Thompson, Pyburn & Ridley
650 Poydras Street, Suite 2800
New Orleans, Louisiana 70130
Telephone: (504) 524-2499

COUNSEL FOR RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH CO., AT&T INFORMATION SYSTEMS, INC., and AT&T COMMUNICATIONS, INC.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS RESTATED

1. Whether the federal courts may properly grant summary judgment based on the evidence in the record when the party opposing the motion submits numerous affidavits in response to the motion, but, does not, pursuant to Fed. R. Civ. P. 56(f) submit an affidavit setting forth the reasons needed for time to conduct discovery nor produce evidence establishing the existence of a material issue of disputed fact?

2. Whether review of the Fifth Circuit's conclusion that there were no disputed issues of material fact is a proper subject for the exercise of this Court's discretionary jurisdiction?

STATEMENT REQUIRED BY RULE 28.1

AT&T Information Systems, Inc. and AT&T Communications, Inc. are wholly-owned subsidiaries of American Telephone and Telegraph Company ("AT&T"). AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Edelson Technology Partners, L.P.; AT&T/Ricoh, Ltd.; AT&T Taiwan Telecommunications Co., Ltd.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; Covidea; AT&T Microelectronia de Espana, S.A.; Sun Microsystems, Inc.; Japan Ens, Ltd.; Jamaica Digiport International Limited; Kalex Circuit Board Company, Limited; Lycom A/S; Omnipage Technology Corporation; Rmcop Office Venture; Rosewood Associates; Southpoint Tower Limited Partnership; and Tower Center Associates.

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STATEMENT OF THE CASE

On January 1, 1984, American Telephone and Telegraph Company (AT&T) divested itself of the Bell Operating Companies pursuant to a court order issued in federal antitrust litigation. Before the divestiture, AT&T and the Communications Workers of America (CWA) entered into an Amended Memorandum of Agreement (AMOA) to address the movement of CWA represented employees from the operating companies to new AT&T subsidiaries such as AT&T Information Systems (ATTIS). The CWA interpreted the AMOA, incorrectly in AT&T's view, as protecting transferred employees from "divestiture" related, as opposed to "economic", layoffs.

In the Fall of 1984 ATTIS reduced its workforce and laid off the *Bache* Petitioners. In response, the CWA processed grievances on their behalf and pursued these grievances through all steps of the grievance procedure. However, because CWA concluded the layoff of the *Bache* Petitioners was "economic", the CWA did not pursue the grievances to arbitration. The *Bache* Petitioners thereafter filed suit against ATTIS and CWA under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, claiming their layoffs violated the AMOA and that the CWA had breached its duty of fair representation. The district court, after granting the *Bache* Petitioners time to conduct discovery, granted summary judgment in favor of all defendants.

In August 1985 ATTIS announced a nationwide layoff. The CWA filed an unfair labor practice charge with the National Labor Relations Board complaining the layoffs resulted from divestiture, rather than economic conditions, and therefore violated the AMOA. The NLRB Regional Director, affirmed by the NLRB General Counsel, rejected the CWA's position that the AMOA imposed restrictions on ATTIS' right to reduce its workforce for any reason whether divestiture or economic related.

In March 1986 ATTIS laid off the *Bankston* Petitioners. They contend the CWA should have grieved their layoffs (as it had done in the *Bache* layoffs). By this time, however, the NLRB Regional Director had already rejected the contractual theory upon which their grievances would have depended, i.e., that the AMOA protected employees from layoff for any reason. Thus, the CWA reasonably did not replicate its prior challenges to the ATTIS layoffs. The *Bankston* Petitioners filed suit alleging their layoffs violated the AMOA. The district court granted the defendants' summary judgment motions "for the same reasons

set forth in *Bache.*" (Appendix to Bankston Petition at B-3).

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to review the complete factual record to determine whether the district court correctly decided there were no disputed material facts. The district court's decisions on this issue have already been reviewed and affirmed by the Fifth Circuit. It is not the function of this Court to review these essentially factual conclusions, *cf. Branti v. Finkel*, 445 U.S. 507, 512 n. 6, 100 S.Ct. 1287, 1291, 63 L.Ed.2d 574 (1980), and there are no exceptional circumstances present to justify review.

The *Bankston* Petitioners argue the lower courts departed from the "accepted and usual course of judicial procedure" by not granting them sufficient opportunity to conduct discovery prior to the court's consideration of summary judgment. Federal Rule 56(f) prescribes the proper method and standard for identifying a request for discovery in response to a motion for summary judgment. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Fifth Circuit properly applied this Court's precedent in rejecting Petitioners' argument:

> Of course, the Court in *Celotex* cautioned that the nonmoving party must have adequate time for discovery, but the Court also stated that problems with premature motions could "be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued." *Id.* at 2554-55. Under Rule 56(f), a party opposing the motion may show by affidavit "that the party

> cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed.R.Civ.P. 56(f). The Bankston plaintiffs submitted no Rule 56(f) affidavits. . . .

840 F.2d at 292. Contrary to the arguments of the Petitioners[1] the lower courts in this case followed standard procedural rules well within the broad range of discretion available to the courts under the Federal Rules of Civil Procedure.

Petitioners also argue there is a disputed issue of material fact as to whether mandatory grievance and arbitration procedures apply to Petitioners' claim their layoffs violated the AMOA. The Fifth Circuit correctly found this argument to be "specious." 840 F.2d at 288. This determination is unworthy of review.

Finally, Petitioners argue the Fifth Circuit decided a federal question "in a way which conflicts with the decisions of this Court," (*Bankston* Petition at p. 17), by incorrectly applying the doctrine of collateral estoppel. The district court decided *Bankston* on the merits, not by applying collateral estoppel principles. The court simply applied its own reasoning and analysis from the nearly identical *Bache* case. Collateral estoppel was never raised as an issue below and was not applied by the lower courts. Thus, it is not a proper subject for review by this Court. *EEOC v. Federal Labor Relations Board*, 476 U.S. 19, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19 (1986).

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[1] There was no order, and undersigned counsel was not present at any conversation where the district court advised counsel for Petitioners that "no extension of time would be granted either to conduct discovery or to assemble a record for appeal." (*Bankston* Petition at 16).

There is no reason for this Court to exercise supervisory jurisdiction over this matter. The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

S/KEITH M. PYBURN JR.

ROBERT K. McCALLA,
KEITH M. PYBURN, JR.
McCalla, Thompson, Pyburn & Ridley
650 Poydras Street, Suite 2800
Poydras Center
New Orleans, Louisiana 70130
Telephone: (504) 524-2499

OF COUNSEL

JOE RAMIREZ
LAWRENCE M. JOSEPH
American Telephone & Telegraph Company
One Oak Way
Berkeley Heights, NJ 07922
Telephone: (201) 771-2174

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Opposition of American Telephone and Telegraph Co., AT&T Information Systems, Inc. and AT&T Communications, Inc. has been served upon all counsel of record by placing a copy of the same in the United States Mail, properly addressed, postage prepaid on this 7th day of September, 1988.

S/KEITH M. PYBURN JR.

KEITH M. PYBURN, JR.